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July 31, 2012

**Via Hand Delivery**

Bridget C. Bohac, Chief Clerk  
Texas Commission on Environmental Quality  
12100 Park 35 Circle  
Building F, 1st Floor  
Austin, Texas 78753

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY  
2012 JUL 31 PM 4:47  
CHIEF CLERKS OFFICE

RE: Wolf Hollow I, LP - Appeal of July 10, 2012 Negative Use Determination of  
Application Number 12268

Dear Ms. Bohac:

We are in receipt of the Executive Director's letter dated July 10, 2012 notifying the Applicant of a negative use determination (the "**Determination**") on its application No. 12268 (the "**Application**")

**I. Procedures For Appeal**

Applicant disagrees with the Determination and pursuant to 30 TAC 17.25 hereby provides:

(1) ~~the name, address, and daytime telephone number of the person filing the appeal~~  
is:

Mike Nasi  
Jackson Walker L.L.P.  
100 Congress Ave., Ste. 1100  
Austin, Texas 78701  
512-236-2216

As legal counsel to:  
Wolf Hollow I, LP

(2) the name and address of the entity to which the use determination was issued:

Wolf Hollow I, LP  
9201 Wolf Hollow Ct  
Granbury, Texas

- (3) the use determination application number for the Application was:

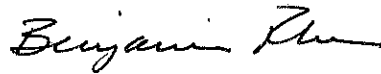
No. 12268

- (4) request Commission consideration of the use determination:

Applicant hereby quests that the Commission sustain the Applicant's appeal of the negative use determination and remand the matter to the Executive Director with instructions to revisit the pollution control aspects of the subject property.

- (5) The basis for the appeal is set forth in full in the attached brief.

Sincerely,



Michael J. Nasi, Counsel for Wolf Hollow I, LP

TCEQ DOCKET NO. \_\_\_\_\_

APPEAL BY NEGATIVE USE

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TEXAS COMMISSION

DETERMINATION ISSUED TO

ON

WOLF HOLLOW I, LP (UD 12268)

ENVIRONMENTAL QUALITY

**APPEAL OF NEGATIVE USE DETERMINATION ISSUED TO  
WOLF HOLLOW I, LP**

Wolf Hollow I, LP ("*Applicant*" or "*Wolf Hollow*") files this appeal of the the negative use determination issued by the Executive Director on July 10, 2012. For the reasons articulated below, the Applicant respectfully requests that the Commission sustain the Applicant's appeal of the negative use determination and remand the matter to the Executive Director with instructions to revisit the pollution control aspects of the subject property.

Part I of this brief provides a brief background of the Pollution Control Property Program; Part II describes the procedural background of the application; Part III details the Applicant's argument why the negative use determination is a misapplication of Texas law, is based on policy concerns outside of the Agency's purview, and is founded on a defective technical evaluation.

**Summary of Argument**

This is an appeal of a negative use determination. Therefore, quite simply, the only question before the Commission in considering this appeal is not whether an exact percentage is appropriate - the Commissioners need only evaluate whether *any* percentage above zero is appropriate. As set forth fully herein, applicable law, prior precedent, and the record in this case demand that a number above zero be used and a positive use determination be issued. Thus, this appeal should be granted and this matter should be remanded back to the Executive Director for a determination that the property in question is eligible for a positive use determination.

**I. Program Background**

On November 2, 1993, Texans approved Proposition 2 amending the Texas Constitution to provide tax relief for pollution control property. This amendment added §1-1 to the Texas Constitution, Article VIII, which states:

- (a) The legislature by general law may exempt from ad valorem taxation all or part of real and personal property used, constructed, acquired, or installed wholly or partly to meet or exceed rules or

regulations adopted by any environmental protection agency of the United States, this state, or a political subdivision of this state for the prevention, monitoring, control, or reduction of air, water, or land pollution.

(b) This section applies to real and personal property used as a facility, device, or method for the control of air, water, or land pollution that would otherwise be taxable for the first time on or after January 1, 1994.

In response to the constitutional amendment, the Texas Legislature added Texas Tax Code, §11.31, Pollution Control Property ("§11.31"). The statute establishes a process where applicants submit Applications for Use Determination to the Executive Director of the TCEQ to determine whether the property is used wholly or in part for pollution control.<sup>1</sup> The Executive Director's role is limited by §11.31 to the specific task of conducting a technical evaluation to determine whether the equipment is used wholly or partly for the control of air, water, or land pollution,<sup>2</sup> and does not include any evaluation of the merit of the tax exemption itself or tax policy implications of granting positive or negative use determinations.

The tax appraisal district where the Pollution Control Property will be installed/constructed is the entity charged with actually granting the tax exemption. If an applicant obtains a positive use determination from the Executive Director, the applicant must then submit another application with the local appraisal district to receive the tax exemption for the pollution control property.

In 2001, the Legislature passed House Bill 3121, which amended §11.31. These amendments included providing a process for appealing the Executive Director's use determinations.<sup>3</sup> House Bill 3121 also required the Commission to adopt rules that establish specific standards for the review of applications that ensure determinations are equal and uniform,<sup>4</sup> and to adopt rules to distinguish the proportion of property that is used to control pollution from the proportion that is used to produce goods or services.<sup>5</sup>

In 2007, §11.31 was amended again with the passage of House Bill 3732, which required the Commission to adopt a list of equipment that is considered pollution control property, including the equipment listed in §11.31(k). In adopting rules for the implementation of House Bill 3732, the TCEQ created a Tier IV application for the categories of listed equipment. For Tier IV applications, the Executive Director must determine the proportion of the equipment used for pollution control and the proportion that is used for production. The application that is the subject of this appeal is a Tier IV application.

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<sup>1</sup> TEX. TAX CODE §11.31(c) and (d).

<sup>2</sup> TEX. TAX CODE §11.31(c).

<sup>3</sup> TEX. TAX CODE §11.31(e).

<sup>4</sup> TEX. TAX CODE §11.31(g)(1) and (g)(2).

<sup>5</sup> TEX. TAX CODE §11.31(g)(3).

## **II. Procedural Background**

On April 19, 2008, the Applicant filed a Tier IV Application for Use Determination for Pollution Control Property with the Executive Director for two Heat Recovery Steam Generators ("HRSGs") to reduce air emissions at the Wolf Hollow Power plant (See Attachment A). The Executive Director received the Application on April 23, 2008 and failed to take any action on matter for over four years. At some point during those four years, the Executive Director conducted a technical review of the application and on July 10, 2012 issued a negative use determination for the two HRSGs, stating that "[h]eat recovery steam generators are used solely for production; therefore, are not eligible for a positive use determination." (See Attachment B).

The Executive Director has received approximately thirty-eight similar applications for HRSGs and associated equipment installed at combined-cycle electric generation facilities. The Executive Director issued 100 percent positive use determinations for twenty-six of the HRSG applications, leaving twelve applications pending. Six of the positive use determinations were appealed by local taxing units. The application at issue in this appeal was one of applications left pending by the Executive Director. On July 10, 2012, the Executive Director issued negative use determinations for all of the pending HRSG applications as well as the six applications that were appealed.

## **III. Executive Director Failed to Comply with the Timeline in Texas Tax Code §11.31(m) for Review of Application**

In 2007, the Texas Legislature passed House Bill 3732, which amended Texas tax Code §11.31. Specifically, House Bill 3732 added subsections (k) and (m). Subsections 11.31(k) and (m) direct that the Commission "shall determine" that "heat recovery steam generators" are "used wholly or partly" as qualifying pollution control property. There is no option under the statute for TCEQ to determine that equipment listed in 11.31(k) is not pollution control equipment. When the Legislature added subsection 11.31(k) in 2007, the purpose was to list equipment that was predetermined to be pollution control equipment and the only evaluation that needed to occur was to determine the percentage of the equipment that qualified as pollution control property. The question is not "whether the equipment is pollution control property", but instead should be "how much is pollution control property."

Furthermore, under Texas Tax Code §11.31(m), the Executive Director "shall" review applications for equipment listed under §11.31(k) and make a determination whether the equipment is wholly or partly pollution control property within 30 days. Furthermore, the statute states that the Executive Director "shall" take action on that determination and notify the applicant and the appraisal district of the determination. Thus, the Executive Director must review and issue a use determination within 30 days for those applications which were submitted after House Bill 3732 became effective, and which include equipment that is listed under Texas tax Code §11.31(k).

As indicated earlier, the Executive Director received Wolf Hollow's application on April 23, 2008. Despite the statute's clear requirement that the Executive Director act within 30 days

on applications for equipment listed under §11.31(k), in this instance, the Executive Director waited over three years from the time the application was submitted to make a determination. By failing to act within 30 days, the Executive Director violated the statutory requirements of Texas Tax Code §11.31(m) and effectively prevented the Applicant from receiving a tax exemption for which it met all of the statutory requirements.

#### IV. Texas Tax Code Requires Consistency

**a) The Executive Director's Use Determination Violates the Equal and Uniform Tax Mandate in Texas Constitution art. VIII, Section 1(a).**

In Texas, all taxation must be equal and uniform. Tex. Const. art. VIII, Section 1(a).<sup>6</sup> The Texas Constitution's equal and uniform standard is strikingly incorporated into Section 11.31:

"(d) The commission shall adopt rules to implement this section. Rules adopted under this section must . . . (2) be sufficiently specific *to ensure that determinations are equal and uniform* . . ."

The constitutional mandate requires that a tax must treat taxpayers within the same class alike, and that any classifications must not be unreasonable, arbitrary, or capricious.<sup>7</sup> The standard for determining equal and uniform taxation is a two-part test: "(1) whether the tax's classification is reasonable; and (2) whether, within the class, the legislation *operates equally*"<sup>8</sup>

A tax cannot satisfy the second prong of the equal and uniform standard unless the value of the tax base is ascertained by the same standard for all taxpayers within each class.<sup>9</sup> ("The standard of uniformity prescribed by the Constitution being the value of property, taxation can not be in the same proportion to the value of the property, unless the value of all property is ascertained by the same standard."). In other words, when taxing value (i.e., the tax base), the Legislature may not say that the same economic value is more for some taxpayers than it is for other taxpayers.

In the instant case the Commission has granted 100 percent exemption for heat recovery steam generator systems that are substantively identical to Applicant's to approximately twenty taxpayers. There has been no reasoned justification for the distinction based on any alleged differences in design or use or location of the equipment. The negative use determination made against Applicant is arbitrary in that there is no substantive distinction between the use or

<sup>6</sup> The Article VIII, Section 1 of the Texas Constitution provides: "(a) Taxation shall be equal and uniform. (b) All real property and tangible personal property in this State, unless exempt as required or permitted by this Constitution, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law."

<sup>7</sup> *Hurt v. Cooper*, 110 S.W.2d 896, 901 (Tex. 1937).

<sup>8</sup> *R.R. Comm'n of Tex. v. Channel Indus. Gas*, 775 S.W.2d 503, 507 (Tex. App.—Austin 1989, writ denied) (emphasis added).

<sup>9</sup> *Lively v. Missouri, K. & T. Ry.*, 120 S.W. 852, 856 (Tex. 1909).

pollution reducing benefit of the HRSGs and the Steam Turbines and the multiple other applicants whose systems have been granted 100 percent positive use determinations by the Commission. Such random enforcement causes 11.31 to operate unequally and in direct violation of the equal and uniform tax mandate.

**b) The Commission Does Not Have Authority to Make a Negative Use Determination Under Section 11.31 of the Texas Tax Code**

Subsections 11.31(k) and (m) direct that the Commission "*shall determine*" that "heat recovery steam generators" and "enhanced steam turbine systems" are "used wholly or partly" as qualifying pollution control property. Tex. Tax Code Section 11.31(k) & (m).

The Determination's negative use finding is facially and patently in violation of the Texas Tax Code.

The applications requested a 100 percent positive use determination that the Applicant's four heat recovery steam generators (the "*HRSGs*") and associated dedicated ancillary equipment were used in accordance with the following statutory standard set forth in Section 11.31<sup>10</sup> of the Texas Tax Code:

"A person is entitled to an exemption from taxation of all or part of real and personal property that the person owns and that is used *wholly or partly as a facility, device, or method for the control of air, water, or land pollution.*"

In this section, "facility, device, or method for the control of air, water, or land pollution" means land that is acquired after January 1, 1994, or any structure, building, installation, excavation, machinery, equipment, or device, and any attachment or addition to or reconstruction, replacement, or improvement of that property, that is used, constructed, acquired, or installed *wholly or partly to meet or exceed rules or regulations adopted by any environmental protection agency of the United States, this state, or a political subdivision of this state for the prevention, monitoring, control, or reduction of air, water, or land pollution.*"

The Application and Attachment C hereto establish the factual basis that the HRSGs and the Steam Turbines qualify as a *device, or method for the control of pollution.*

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<sup>10</sup> Section 11.31 of the Texas Tax Code is authorized by Article VIII, Section 1-1 of the Texas Constitution, which provides: "(a) The legislature by general law may exempt from ad valorem taxation all or part of real and personal property used, constructed, acquired, or installed wholly or partly to meet or exceed rules or regulations adopted by any environmental protection agency of the United States, this state, or a political subdivision of this state for the prevention, monitoring, control, or reduction of air, water, or land pollution. (b) This section applies to real and personal property used as a facility, device, or method for the control of air, water, or land pollution that would otherwise be taxable for the first time on or after January 1, 1994. . . . (Added Nov. 2, 1993.)"

Despite the clear factual record that the HRSGs control pollution, the Determination summarily finds, without explanation or substantive reasoning, that the HRSGs will be subject to a negative use determination because they are "used solely for production." The facts do not support the Determination, and there is no reasonable interpretation of Section 11.31 that would support the Determination.

Section 11.31 must be construed to give effect to the Legislature's intent.<sup>11</sup> An agency or court should first attempt to determine this intent from the actual language used by the Legislature. That is, an agency or court should first look to the plain, ordinary meaning of the statute's words.<sup>12</sup> Most importantly, "[i]f a statute is clear and unambiguous, [the courts] apply its words according to their common meaning without resort to rules of construction or extrinsic aids."<sup>13</sup> This is true even when the agency charged with enforcing the statute seeks to apply a different construction.<sup>14</sup>

Further, Texas Attorney General Opinion JC-0372 (2001) has expressly opined to the Chair of the Texas Natural Resource Conservation Commission that "methods of production" can and do qualify as exempt pollution control property:

"Section 11.31 is *broadly written, and we believe its plain meaning is clear*. It embraces any property, real or personal, "that is used wholly or partly as a facility, device, or method for the control of air, water or land pollution. . . ." (*emphasis added*).

"Next, we consider whether section 11.31 excludes from its scope pollution-reducing *production* equipment. Significantly, the statute applies to property used "wholly or partly" for pollution control. See *id.* §11.31(a). To qualify for the exemption, property must be used "wholly or partly" to meet or exceed environmental rules. See *id.* §11.31(b). The term "wholly" clearly refers to property that is used only for pollution control, such as an add-on device. See Merriam Webster's Collegiate Dictionary 1351 (10th ed. 1993) (defining "wholly" to mean "to the full or entire extent: ... to the exclusion of other things"). *The term "partly," however, embraces property that has only some pollution-control use*. See *id.* at 848 (defining "partly" to mean "in some measure or degree"). This broad formulation clearly embraces more than just add-on devices. *Furthermore, that statute clearly embraces not only "facilities" and "devices" but also "methods" that prevent, monitor, control,*

<sup>11</sup> See TEX. GOV'T CODE §312.005; *Gilbert v. El Paso County Hosp. Dist.*, 38 S.W.3d 85 (Tex. 2001).

<sup>12</sup> See TEX. GOV'T CODE §312.002(a); *Am. Home Prods. Corp. v. Clark*, 38 S.W.3d 92, 95-96 (Tex. 2000); *Crimmins v. Lowry*, 691 S.W.2d 582, 584 (Tex. 1985).

<sup>13</sup> *In Re Nash*, 220 S.W.3d 914, 917 (Tex. 2007) (*emphasis added*).

<sup>14</sup> See *Pretzer v. Motor Vehicle Bd.*, 138 S.W.3d 908, 914-15 (Tex. 2004); *Barchus v. State Farm Fire & Cas. Co.*, 167 S.W.3d 575, 578 (Tex. App.—Houston [14th Dist.] 2005, *pet denied*).



*or reduce pollution. "Methods" is an extremely broad term that clearly embraces means of production designed, at least in part, to reduce pollution. See id. at 732 (defining "method" to include "a way, technique, or process of or for doing something").*

The HRSGS and associated dedicated ancillary equipment are clearly used to comply with environmental laws and to control pollution and qualify for exemption under any valid rule or convention of statutory construction.

**c) Failure To Comply With Commission Rules and the Texas Administrative Procedures Act.**

The Commission cannot arbitrarily and capriciously create and enforce a new internally derived formula for heat recovery steam generators resulting in a drastic increase in the amount of property taxes assessed against Applicant, without, at the very least,<sup>15</sup> adhering to the Texas Administrative Procedure Act (the "APA").

In brief, the APA requires state agencies to follow certain formal procedures before adopting and applying any "rule."<sup>16</sup> Among other requirements, the APA requires state agencies to provide notice of any intent to promulgate a new rule, to publish the contemplated new rule, and to invite public comment with respect to the new rule.<sup>17</sup> As the Texas Supreme Court explained: "In this way, the APA assures that the public and affected persons are heard on matters that affect them and receive notice of new rules."<sup>18</sup>

In addition to the APA requirements regarding the procedures that must be applied by state agencies when adopting and applying any "rule," Texas courts frequently require that an agency explain its reasoning when it "appears to the reviewing court that an agency has departed from its earlier administrative policy or there exists an apparent inconsistency in agency determinations." By issuing a 100 percent use determination and ultimately issuing a negative use determination, the TCEQ Executive Director's staff has departed from its earlier policy with regard to the evaluation of HRSGs. Furthermore, as explained earlier, TCEQ has issued 100 percent use determinations for other HRSGs, but issued negative use determinations for those applications that were appealed. In doing so, the TCEQ provided a one sentence explanation stating, "[HRSGs] are used solely for production and, therefore, are not eligible for a positive use determination."

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<sup>15</sup> And subject to the statutory arguments set forth below.

<sup>16</sup> The APA defines the term "rule" to mean "a state agency statement of general applicability that... implements, interprets, or prescribes law or policy." Tex. Gov't Code § 2001.003(6).

<sup>17</sup> See *Rodriguez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 255 (Tex. 1999), *reh'g of cause overruled* (Sept. 9, 1999); see also Tex. Gov't Code § 2001.004(2) (additionally requiring agencies to "index, cross-index to statute, and make available for public inspection all rules and other written statements of policy or interpretations that are prepared, adopted, or used by the agency in discharging its functions").

<sup>18</sup> *Id.*

In this case the Commission clearly failed to follow the procedures of the Texas APA in reaching and applying its interpretation of Section 11.31(k) and (m) of the Texas Tax Code. Because the Commission failed to promulgate any rule or other formal statement expressing its new interpretation of Section 11.31(k) and (m) of the Texas Tax Code, its interpretation violates the APA and must be disregarded.

Further, the Determination appears to represent a sea change in the Commission's interpretation of Section 11.31 without any change to its Section 11.31 rules. The Commission's attempt to make a material change in policy retroactively without compliance with the APA is an invalid rule under the APA under the analysis in *El Paso Hospital District v. Texas Health and Human Services Commission*, 247 S.W.3d 709 (Tex. 2008).<sup>19</sup>

In *El Paso Hospital District*, the Texas Health and Human Services Commission ("HHSC") adopted a regulation that established a "base year" for gathering claims data to be used in setting certain Medicaid hospital payment rates. Several hospitals sought a declaratory judgment that the cutoff rule was invalid under the APA, because HHSC did not adopt the rule in accordance with the APA. HHSC argued that the cutoff date was not a rule itself but rather an interpretation of a rule. The Texas Supreme Court held that the agency-applied cutoff date was an invalid rule because the agency did not follow the proper rule-making procedures contained in the APA. The Texas Supreme Court stated:

"HHSC argues that it complied with these statutes, and that the February 28 cutoff is not a rule itself, but rather its interpretation of the base-year rule. The Hospitals disagree, arguing the February 28 cutoff falls squarely within the APA's definition of a rule. We agree with the Hospitals. Under the APA, a rule: (1) is an agency statement of general applicability that either "implements, interprets, or prescribes law or policy" or describes [HHSC'S] "procedure or practice requirements;" (2) "includes the amendment or repeal of a prior rule;" and (3) "does not include a statement regarding only the internal management or organization of a state agency and not affecting private rights or procedures." TEX. GOV'T CODE §2001.003(6)(A)-(C). *El Paso Hospital District* at 714.

The Commission's new internal formula or reasoning that resulted in the Determination interprets or prescribes law or policy and amends or repeals positions previously applied by the Commission.

The violation of APA requirements is especially egregious in this case given that Section 11.31(l) of the Texas Tax code mandates that the TCEQ, "by rule shall update the list adopted under Subsection (k)" and then makes clear that "[a]n item may be removed from the list if the commission finds compelling evidence to support the conclusion that the time does not provide

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<sup>19</sup> *El Paso Hospital District v. Texas Health and Human Services Commission*, 247 S.W.3d 709 (Tex. 2008).

pollution control benefits." No APA rulemaking procedure has been followed to remove HRSGs or enhanced steam turbine systems from Section 11.31(k) and it is inconceivable how the TCEQ could find that "compelling evidence exists to support the conclusion that [HRSGs] do not provide pollution control benefits."

**V. The Record Supports a Positive Use Determination and Clearly Contradicts a Negative Use Determination**

**a) Pollution Control Property**

The only question before the Commission in considering this appeal is not whether an exact percentage is appropriate - the Commissioners need only evaluate whether *any* percentage above zero is appropriate. The Applicant's HRSGs can be defined as pollution control property based on the prevention of NOx emissions from natural gas use efficiencies. Under Tax Code § 11.31(a), "[a] person is entitled to an exemption from taxation of all or part of real and personal property that the person owns and that is used wholly or partly as a facility, device, or method for the control of air, water, or land pollution." (emphasis added). The statute defines "a facility, device, or method for the control of air, water, or land pollution" as:

"[a] structure, building, installation excavation, machinery, equipment or device, and any attachment or addition to or reconstruction, replacement or improvement of that property, that is used, constructed, acquired, or installed wholly or partly to meet or exceed rules or regulations adopted by any environmental protection agency of the United States, this state, or a political subdivision of this state for the prevention, monitoring, control, or reduction of air, water, or land pollution."

Thus to qualify as pollution control property, the equipment or structure must control pollution and must meet or exceed applicable environmental protection regulations.

**b) Method of Pollution Control**

The use of otherwise wasted heat in the turbine exhaust gas within the HRSG results in higher plant thermal efficiency (net power output of the plant divided by the heating value of the fuel), compared to other power generation technologies. A plant incorporating a combined cycle design emits less NO<sub>x</sub> per pound of fossil fuel combusted due to the incorporation of both the Brayton and Rankine Thermodynamic cycles within plant design operations

Specifically, the equipment's increased thermal efficiency, as compared to a traditional steam boiler unit, reduces the fuel needs for the same power outputs, while emitting no additional air emissions. It is important to note that the lower fuel consumption associated with increased fuel conversion efficiency not only reduces NOx emissions, but also reduces emissions of hazardous air pollutants and greenhouse gas emissions such as CO<sub>2</sub>.

**c) HRSGs are Used to Meet Certain New Source Performance Standards for Electric Generating Facilities**

As cited in the Application, Title 40 of the Code of Federal Regulations ("**CFR**") subpart 60.44Da establishes New Source Performance Standards ("**NSPS**") for emissions of air contaminants for electric utility steam generating facilities. Subpart §60.40Da(e)(1) specifically lists HRSGs as subject to the NSPS requirements in 60.44Da, stating:

(i.e. heat recovery steam generators used with duct burners) associated with a stationary combustion turbine that are capable of combusting more than 73 MW (250MMBtu/H) heat input of fossil fuel are subject to this subpart except in cases when the affected facility (i.e. heat recovery steam generator) meets the applicability requirements of and is subject to subpart KKKK of this part..

Therefore, Applicant's four HRSGs are subject to the performance standards for air emissions as established within the Subpart Da. Specifically, they are subject to Section 60.44Da Standards for nitrogen oxides (NO<sub>x</sub>) which states:

Except as provided in paragraph (h) of this section, on and after the date on which the initial performance test is completed or required to be completed...no owner or operator subject to the provisions of this subpart shall cause to be discharged into the atmosphere from any affected facility for which construction...commenced before July 10, 1997 any gases that contain NO<sub>x</sub> (expressed as NO<sub>2</sub>) in excess of the applicable emissions limit in paragraphs (a)(1) and (2) of this section.

Furthermore, the Applicant's HRSGs were designed to meet the national primary and secondary ambient air quality standards ("**NAAQs**") for oxides of nitrogen (with nitrogen dioxide as the indicator) as set forth in 40 CFR §50.11.

**d) Evaluation of Efficiency Based Output is An Appropriate Measure of Pollution Control**

The HRSG allows more electrical energy to be produced for a given heat input than is possible using a simple cycle or steam boiler/turbine configuration. Since less fuel is utilized per kilowatt of power produced, less exhaust gas emission are produced. The efficiency based output argument, which calculates the improvement in efficiency of the thermal cycle of a traditional power plant is an appropriate way to characterize the pollution prevention function of the Applicant's HRSGs.

Emissions limits for power plants that are based upon measures of fuel input, not emissions output, of the power generation system have long been known to ignore the real emissions reductions achieved by combustion turbine power plants of both simple and combined cycle design. Both the U.S. Environmental Protection Agency ("**EPA**") and other states

recognize the use of energy efficiency as a measure of pollution control and/or pollution prevention with some states using this method as part of their tax exemption programs.

Monitoring data from the Barney Davis Power Plant during both pre and post-repowering of that plant confirm the assumptions regarding the air emissions reductions per pound of fossil fuel use. This data is set out in Attachment "C."

**VI. TCEQ's Role as a Technical Advisor to the State in Administering the Prop 2 Program Includes Factoring in Ever-Evolving Pollution Control Policies, not Tax Policy**

The clear structure and purpose of Section 11.31 of the Texas Tax Code has for nearly two decades been for the TCEQ to serve as the scientific and technical arbiter for determining the types of equipment that qualify as pollution control property. The TCEQ's role has always been to implement an efficient, consistent and scientifically accurate process to determine technologies that meet the statutory definition of pollution control property. Section 11.31 directs the TCEQ to determine whether particular items of property are used for pollution control based on its specialized knowledge and expertise.

Section 11.31 creates clear and separate roles for: (i) the TCEQ, as the technical expert on pollution control property; and (ii) the appraisal districts whose job it is to value property. The TCEQ's role does not involve local tax administration or local budgetary issues. The specter of prejudice to a local tax base by appraisal districts based on the unfounded argument that HRSGs and Steam Turbines are production equipment is a thinly veiled argument that is outside of the TCEQ's role, and that potentially leads to double taxation of the residual, non-pollution control portion, of the plant, which is routinely valued, at least in part, on an income basis. *See e.g., Tex. Tax Code Section 23.0101.*"

It is not the role of the Commission to evaluate the tax policy and budget impacts of tax exemption decisions. Now that output-based emission limits are the law of the Land, whether talking about conventional pollutants such as NOx, or newly-implemented rules regarding Greenhouse Gases (GHGs), the Commission's technical evaluations must evolve along with those standards.

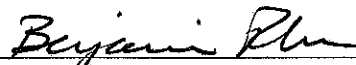
Gone are the days when the Commission need only confirm the pollution control characteristics of bolt-on pollution control devices. The Commission now has the much more complicated job of developing a consistent approach for calculating the pollution control aspects of "devices and methods" that also have productive value. The pending HRSGs appeals are an early indicator of that evolving role.

Whether or not the Commission chooses to stay with its initial approach of granting 100% exemptions to HRSGs, it must develop a consistent methodology that embraces the reality that HRSGs and similar technologies are, in many instances, the only (or at least most sensible) way for fossil fuel-fired power generation to be built in compliance with new output-based emission limits.

### **Conclusion**

As noted at the outset of this brief, the question before the Commission in considering this appeal is not whether an exact percentage is appropriate - the Commissioners need only evaluate whether *any* percentage above zero is appropriate. As set forth fully above, applicable law, prior precedent, and the record in this case demand that a positive use determination be issued. Thus, this appeal should be granted and this matter should be remanded back to the Executive Director for a determination that the property in question is eligible for a positive use determination.

Respectfully submitted,



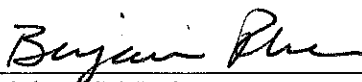
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512-236-2002 (Facsimile)  
[mnasi@jw.com](mailto:mnasi@jw.com)

ATTORNEYS FOR WOLF HOLLOW I, LP

### **CERTIFICATE OF SERVICE**

I hereby certify that on the 31<sup>st</sup> day of July, 2012, a copy of the foregoing was provided by electronic mail or U.S. First Class Mail to the attached mailing list:

*for*   
Michael J. Nasi

### Mailing List

Daniel Long  
Texas Environmental Law Division MC 173  
P. O. Box 13087  
Austin, Texas 78711-3087  
512/239-0600 FAX 512/239-0606

*Courtesy Copy via U. S. Mail*

Susana M. Hildebrand, P.E.  
TCEQ Chief Engineer's Office MC 168  
P. O. Box 13087  
Austin, Texas 78711-3087  
512/239-4900 FAX 512/239-6188

*Courtesy Copy via U. S. Mail*

Chance Goodin  
TCEQ Chief Engineer's Office MC 206  
P. O. Box 13087  
Austin, Texas 78711-3087  
512/239-6336 FAX 512/239-6188

*Courtesy Copy via U. S. Mail*

Robert Martinez  
TCEQ Environmental Law Division MC 173  
P. O. Box 13087  
Austin, Texas 78711-3087  
512/239-0600 FAX 512/239-0606

*Courtesy Copy via U. S. Mail*

Blas Coy  
TCEQ Office of Public Interest Counsel  
MC 103  
P. O. Box 13087  
Austin, Texas 78711-3087

*Courtesy Copy via U. S. Mail*

# Attachment A

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**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
APPLICATION FOR USE DETERMINATION  
FOR POLLUTION CONTROL PROPERTY**

The TCEQ has the responsibility to determine whether a property is a pollution control property. A person seeking a use determination must complete the attached application or a copy or similar reproduction. For assistance in completing this form refer to the TCEQ guidelines document, *Property Tax Exemptions for Pollution Control Property*, as well as 30 TAC §17, rules governing this program. For additional assistance please contact the Tax Relief for Pollution Control Property Program at (512) 239-3100. The application should be completed and mailed, along with a complete copy and the appropriate fee, to: TCEQ MC-214, Cashiers Office, PO Box 13088, Austin, Texas 78711-3088.

**Information must be provided for each field unless otherwise noted.**

**1. GENERAL INFORMATION**

A. What is the type of ownership of this facility?

- |   |  |
|---|--|
| <input type="checkbox"/> Corporation            | <input type="checkbox"/> Sole Proprietor |
| <input checked="" type="checkbox"/> Partnership | <input type="checkbox"/> Utility         |
| <input type="checkbox"/> Limited Partnership    | <input type="checkbox"/> Other:          |

B. Size of company: Number of Employees

- |   |   |
|---|---|
| <input checked="" type="checkbox"/> 1 to 99 | <input type="checkbox"/> 1,000 to 1,999 |
| <input type="checkbox"/> 100 to 499         | <input type="checkbox"/> 2,000 to 4,999 |
| <input type="checkbox"/> 500 to 999         | <input type="checkbox"/> 5,000 or more  |

C. Business Description: (Provide a brief description of the type of business or activity at the facility)

Electricity generation

**2. TYPE OF APPLICATION**

- |  |   |
|--|---|
| <input type="checkbox"/> Tier I \$150 Fee    | <input type="checkbox"/> Tier III \$2,500 Fee         |
| <input type="checkbox"/> Tier II \$1,000 Fee | <input checked="" type="checkbox"/> Tier IV \$500 Fee |

*NOTE: Enclose a check, money order to the TCEQ, or a copy of the ePay receipt along with the application to cover the required fee.*

**3. NAME OF APPLICANT**

A. Company Name: Wolf Hollow I LP  
B. Mailing Address (Street or P.O. Box): 12837 Louetta, Ste 201  
C. City, State, and Zip: Cypress, TX 77429

**4. PHYSICAL LOCATION OF PROPERTY REQUESTING A TAX EXEMPTION**

A. Name of Facility or Unit: Wolf Hollow Power Plant  
B. Type of Mfg. Process or Service: Electricity Generation  
C. Street Address: P.O. Box 2129  
D. City, State, and Zip: Granbury, TX 76048  
E. Tracking Number (Optional): \_\_\_\_\_  
F. Company or Registration Number (Optional): \_\_\_\_\_

**5. APPRAISAL DISTRICT WITH TAXING AUTHORITY OVER PROPERTY**

A. Name of Appraisal District: Hood County Appraisal District  
B. Appraisal District Account Number: \_\_\_\_\_

6. **CONTACT NAME**

A. Company/Organization Name Cummings Westlake LLC  
 B. Name of Individual to Contact: Dale Cummings  
 C. Mailing Address (Street or P.O. Box): 12837 Louetta, Suite 201  
 D. City, State, and Zip: Cypress, TX 77429  
 E. Telephone number and fax number: (713) 266-4456 X-1  
 F. E-Mail address (if available): dcummings@cwlp.net

7. **RELEVANT RULE, REGULATION, OR STATUTORY PROVISION**

For each media, please list the specific environmental rule or regulation that is met or exceeded by the installation of this property.

MEDIUM	Rule/Regulation/Law
Air	30 TAC 117.1310
Water	
Waste	

8. **DESCRIPTION OF PROPERTY (Complete for all applications)**

Describe the property and how it will be used at your facility. Do not simply repeat the description from the Equipment & Categories List. Include sketches of the equipment and flow diagrams of the processes where appropriate. Use additional sheets, if necessary.  
Wolf Hollow installed two heat recovery steam generators in 2002 to reduce air emissions. Please see attached description.

Land: If a use determination is being requested for land, provide a legal description and an accurate drawing of the property in question.

9. **PARTIAL PERCENTAGE CALCULATION**

This section is to be completed for Tier III and IV applications. For information on how to conduct the partial percentage calculation, see the application instructions document. Attach calculation documents to completed application.

10. **PROPERTY CATEGORIES AND COSTS**

List each control device or system for which a use determination is being sought. Provide additional attachments for more than 3 properties.

Property	Taxable on 1/01/94?	DFC Box	ECL #	Estimated Cost	Use %
Land					
Property <u>Heat recovery steam generator</u>	<u>No</u>	<u>7</u>	<u>B-8</u>	<u>\$35,000,000</u>	<u>62.1%</u>
Totals				<u>\$35,000,000</u>	<u>62.1%</u>

61.2%

#### ATTACHMENT TO WOLF HOLLOW I, LP TCEQ APPLICATION

The Wolf Hollow plant is constructed as a Combined Cycle facility, and as such utilizes a Heat Recovery Steam Generator (HRSG) as a key component of its process. The HRSG is designed to capture exhaust gases from a combustion turbine, and to convert this heat energy into high pressure and temperature steam. Heat transfer occurs through banks of finned tubes in the HRSG that contain water on the inside, contacted by the hot exhaust gases on the outside.

The use of a HRSG in Combined Cycle facilities results in an improvement in efficiency of the thermal cycle of a traditional power plant from approximately 36% to 50%. This allows more electrical energy to be produced for a given heat input than is possible by a simple cycle or traditional steam boiler/turbine (Rankin cycle) configuration. Since less fuel is utilized per kilowatt of power produced, less exhaust gas emissions ( $\text{NO}_x$ , CO,  $\text{CO}_2$ , etc) are produced as a result. The HRSG's primary purpose of capturing and converting waste heat therefore results in positive environmental benefits.

Wolf Hollow I LP is claiming 61.2% of the cost of the HRSG is pollution control equipment.

The calculation is based upon the difference between the thermal efficiency in simple cycle versus combined cycle mode.

Efficiency gain due to HRSG:  $(50\%/36\%) - 1 = 38.8\%$

Environmental benefit:  $(1 - \text{efficiency gain of } 38.8\%) = 61.2\%$

11. **EMISSION REDUCTION INCENTIVE GRANT**

*(For more information about these grants, see the Application Instruction document).*

Will an application for an Emission Reduction Incentive Grant be filed for this property/project?

☐ Yes ☐ No

12. **APPLICATION DEFICIENCIES**

After an initial review of the application, the TCEQ may determine that the information provided with the application is not sufficient to make a use determination. The TCEQ may send a notice of deficiency, requesting additional information that must be provided within 30 days of the written notice.

13. **FORMAL REQUEST FOR SIGNATURE**

By signing this application, you certify that this information is true to the best of your knowledge and belief.

Name:

*J. Cummings*

Date: 4/19/08

Title:

Authorized Agent

Company:

Cummings Westlake LLC

Under Texas Penal Code, Section 37.10, if you make a false statement on this application, you could receive a jail term of up to one year and a fine up to \$2,000, or a prison term of two to 10 years and a fine of up to \$5,000.

14. **DELINQUENT FEE/PENALTY PROTOCOL**

This form will not be processed until all delinquent fees and/or penalties owed to the TCEQ or the Office of the Attorney General on behalf of the TCEQ are paid in accordance with the Delinquent Fee and Penalty Protocol. (Effective September 1, 2006)

# Attachment B

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Bryan W. Shaw, Ph.D., *Chairman*  
Carlos Rubinstein, *Commissioner*  
Toby Baker, *Commissioner*  
Zak Covar, *Executive Director*



## TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

*Protecting Texas by Reducing and Preventing Pollution*

July 10, 2012

Mr. Dale Cummings  
Agent  
Cummings Westlake LLC  
12837 Louetta Ste 201  
Cypress, Texas 77429

Re: Notice of Negative Use Determination  
Wolf Hollow I, LP  
Wolf Hollow Plant  
9201 Wolf Hollow Ct  
Granbury (Hood County)  
Application Number: 12268

Dear Mr. Cummings:

This letter responds to Wolf Hollow I, LP's Application for Use Determination, received April 23, 2008, pursuant to the Texas Commission on Environmental Quality's (TCEQ) Tax Relief for Pollution Control Property Program for the Wolf Hollow Plant.

The TCEQ has completed the review for application #12268 and has issued a Negative Use Determination for the property in accordance with Title 30 Texas Administrative Code (TAC) §17.4 and §17.6. Heat recovery steam generators are used solely for production; therefore, are not eligible for a positive use determination.

Please be advised that a Negative Use Determination may be appealed. The appeal must be filed with the TCEQ Chief Clerk within 20 days after the receipt of this letter in accordance with 30 TAC §17.25.

If you have questions regarding this letter or need further assistance, please contact Ronald Hatlett of the Tax Relief for Pollution Control Property Program by telephone at (512) 239-6348, by e-mail at [ronald.hatlett@tceq.texas.gov](mailto:ronald.hatlett@tceq.texas.gov), or write to the Texas Commission on Environmental Quality, Tax Relief for Pollution Control Property Program, MC-110, P.O. Box 13087, Austin, Texas 78711-3087.

Sincerely,

Chance Goodin, Team Leader  
Stationary Source Programs  
Air Quality Division

CG/RH

Mr. Dale Cummings  
Page 2  
July 10, 2012

cc: Chief Appraiser, Hood County Appraisal District, P. O. Box 819, Granbury, Texas 76048

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# Attachment C

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**Pre-Repowering Efficiency and Air Emissions Unit 1**

FACILITY_NAME	UNITID	OP_YEAR	HEAT_INPUT	NOX_RATE lbs/MMBTU	NOX_MASS TONS	Gross Load (MW-H)	CO2 Tons	Operating Hours	NOX TONS/MW-HR
Barney M. Davis	1	2003	9,882,095	0.14	814.4	923,389	611,010.3	8,398	0.0009
Barney M. Davis	1	2004	1,365,091	0.1	115.4	115,931	81,133.3	1,273	0.0010
Barney M. Davis	1	2005	4,018,371	0.13	343.1	363,700	238,809.6	3,423	0.0009
Barney M. Davis	1	2006	3,861,536	0.12	319.8	361,211	229,487.0	2,820	0.0009
Barney M. Davis	1	2007	1,815,633	0.15	198.3	173,553	107,904.3	1,658	0.0011
Barney M. Davis	1	2008	4,749,542	0.13	420.8	436,979	282,257.8	3,852	0.0010
Barney M. Davis	1	2009	3,199,412	0.15	332.1	315,615	190,145.3	2,112	0.0011
Barney M. Davis	1	2010	660,763	0.1	48.3	53,988	39,255.9	843	0.0009
Barney M. Davis	1	2011	1,906,567	0.1	131	162,795	113,303.8	1,761	0.0008
Barney M. Davis	1	2012	1,674,769	0.012	138.1	138,581	99,528.2	1,494	0.0010

**Pre-Repowering Efficiency and Air Emissions Unit 2**

FACILITY_NAME	UNITID	OP_YEAR	HEAT_INPUT	NOX_RATE lbs/MMBTU	NOX_MASS TONS	Gross Load (MW-H)	CO2 Tons	Operating Hours	NOX TONS/MW-HR
Barney M. Davis	2	2003	2,094,717	0.1	152.7	189,000	131,053.6	1,606	0.0008
Barney M. Davis	2	2004	11,922,584	0.12	837.6	1,070,886	708,543.8	7,750	0.0008
Barney M. Davis	2	2005	6,256,894	0.11	388.7	516,358	371,836.8	5,580	0.0008
Barney M. Davis	2	2006	2,965,995	0.15	280.5	233,671	176,265.6	1,763	0.0012
Barney M. Davis	2	2007	1,339,322	0.09	82.8	120,870	79,592.2	1,060	0.0007
Barney M. Davis	2	2008	3,419,274	0.15	294.4	312,553	203,201.2	2,679	0.0009

**Post-Repowering Efficiency and Air Emissions BMD Units 3, 4 & NB Units 8, 9**

FACILITY_NAME	UNITID	OP_YEAR	HEAT_INPUT	NOX_RATE lbs/MMBTU	NOX_MASS TONS	Gross Load (MW-H)	CO2 Tons	Operating Hours	NOX TONS/MW-HR
Barney M. Davis	3	2011	8,264,568	0.03	73.3	1,064,646	491,149.8	5637	0.0001
Barney M. Davis	3	2012	5,289,883	0.02	40.1	687,398	314,371.3	3524	0.0001
Barney M. Davis	4	2011	8,092,698	0.03	68.9	1,081,929	480,942.4	5742	0.0001
Barney M. Davis	4	2012	4,943,162	0.02	36.3	663,495	293,764.0	3425	0.0001
Nueces Bay	8	2011	7,989,948	0.02	52.7	1,093,549	474,830.6	5692	0.0000
Nueces Bay	8	2012	5,011,986	0.02	30	687,430	297,856.4	3517	0.0000
Nueces Bay	9	2011	7,978,245	0.02	45.5	1,092,722	474,132.6	5558	0.0000
Nueces Bay	9	2012	5,117,020	0.02	29.5	698,703	304,095.0	3545	0.0000

